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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 606

ADELHEIDT AUGUSTA NINA EDWINA VON HARDENBERG AND IRMGARD STELLA VON ALTEN, PETITIONERS

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The unreported opinion of the Circuit Court of Cook County, Illinois, appears at pages 23-36 of the Abstract of Record. The opinion of the Supreme Court of Illinois (Abst. 39-45) is reported in 410 Ill. 354.

JURISDICTION

The judgment of the Supreme Court of Illinois became final November 27, 1951 (Abst. 46-47). The petition for a writ of certiorari was filed Feb-

ruary 21, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

STATUTES INVOLVED

Section 2 of the Trading with the Enemy Act (40 Stat. 411, 50 U.S.C. App. 2) provides in pertinent part:

* * * * *

> The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.
>
> The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

Section 5(b) of the Trading with the Enemy Act, as amended by Title III of the First War Powers Act of 1941 (55 Stat. 839; 50 U.S.C. App. 5(b)) provides in pertinent part:

> (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise * * * (B) * * * direct and compel * * * any * * * transfer * * *

> of * * * any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *.

Section 7(c) of the Trading with the Enemy Act (40 Stat. 411, as amended by 40 Stat. 1020; 50 U.S.C. App. 7(c)) provides in pertinent part:

> If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy * * * not holding a license granted by the President hereunder, which the President after investigation shall determine * * * so belongs or is so held, shall be conveyed, transferred, as-

> signed, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian * * *.

QUESTION PRESENTED

Whether the powers conferred by the Trading with the Enemy Act could constitutionally be exercised as to property vested after the termination of hostilities but prior to the resolution of Congress terminating, for most purposes, the war with Germany.

STATEMENT

Plaintiff, Orme, filed the instant action on July 2, 1943 to construe the will of Louisa Bigelow, deceased. Plaintiff asserts that he is entitled to one-third of the trust created by that will as against certain persons, among whom are petitioners. (Abstract of Record, pgs. 1-3) The petitioners are German nationals, residing in Germany. (Abstract of Record, 9, 13, 20, 24, 39)

While this action was pending, the Attorney General[1] executed Vesting Orders No. 13022 and 13192, by which he vested in himself all right, title and interest of the petitioners in the Bigelow trust. (Abstract of Record, 5, 6) The Attorney General then filed a petition in the instant action praying that he be permitted to appear in the place and stead of the petitioners. (Abst. of Record, 3-7) The petitioners filed an answer which did not deny

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[1] By Executive Order No. 9788, 11 F.R. 11981, October 14, 1946, the Attorney General of the United States succeeded to the powers and duties of the Alien Property Custodian.

any material allegation of fact. (Abst. of Record, 8-12) They also filed a petition seeking leave to appear and defend the law suit. (Abst. of Record, 12-14) On the same day, an order was issued which apparently authorized petitioners to appear and defend. (Abst. of Record, 14) The Attorney General on July 1, 1949, filed a petition to vacate that order. (Abst. of Record, 15-16) The petitioners answered, but did not deny any material allegations of fact. (Abst. of Record, 17-18).

On November 9, 1950 (Abst. of Record, 19), pursuant to a written opinion (Abst. of Record 23-36), the trial court entered an order substituting the Attorney General as a party defendant in lieu of the petitioners. The earlier order which appeared to permit petitioners to appear and defend was set aside. (Abst. of Record, 19-22)

Petitioners appealed to the Illinois Supreme Court (Abst. of Record, 40), which affirmed the order of the Circuit Court.

ARGUMENT

It is well settled that the seizure and confiscation of enemy property during time of war is not prohibited by any provision of the Constitution. *Miller* v. *United States (Page* v. *United States)*, 11 Wall. 268, 305, 306; *Central Trust Co.* v. *Garvan*, 254 U.S. 554; *Stoehr* v. *Wallace*, 255 U.S. 239; *United States* v. *Chemical Foundation*, 272 U.S. 1; *Cummings* v. *Deutsche Bank*, 300 U.S. 115; *Silesian-American Corporation* v. *Clark*, 332 U.S. 469.

Petitioners urge, however, that the seizure here in question deprived them of property without due process of law because it was made in 1949, after the termination of hostilities, and petitioners were not then "enemies"; and that the war was terminated by the occupation of Germany by the Allies.

The courts have consistently upheld the exercise of the power to seize enemy property after the termination of hostilities but before the "end of the war" as defined in the Trading with the Enemy Act. *Commercial Trust Co.* v. *Miller*, 262 U.S. 51, 57; *Feyerabend* v. *McGrath*, 189 F. 2d 694 (C.A. D.C.); *In re Miller*, 281 Fed. 764, 775 (C.A. 2), appeal dismissed *sub nom. Schaefer* v. *Miller*, 262 U.S. 760; *Salamandra Ins. Co.* v. *New York Life Ins. & Trust Co.*, 254 Fed. 852, 861-862 (S.D. N.Y.). *Cf. Ludecke* v. *Watkins*, 335 U.S. 160, rehearing denied, 335 U.S. 837; *Woods* v. *Miller Co.*, 333 U.S. 138; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111. Nor does the collapse of the Hitler regime affect the situation. *Ludecke* v. *Watkins*, 335 U.S. 160, 170; *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396, 401 (C.A. 2); *United States* v. *Watkins*, 163 F. 2d 140, 143 (C.A. 2), certiorari denied, 332 U.S. 838. And see, *Clark* v. *Allen*, 331 U.S. 503, 514.

The decision as to when a state of war shall terminate is for the political branches—the executive and legislative. *Ludecke* v. *Watkins*, 335 U.S. 160, 168-169. For most purposes, Congress terminated the state of war between the United States and

Germany effective October 19, 1951. Public Law 181, 82d Congress, 65 Stat. 451.[2] In so doing, however, Congress expressly preserved the applicability of the Trading with the Enemy Act to all property which, prior to January 1, 1947, was subject to vesting or seizure under that Act.[3] The present vesting orders were issued in 1949, two years before the Resolution. Since title to the property passed to the Custodian upon their issuance, his powers as owner do not depend on the terms of the subsequent resolution terminating the war, *Great Northern Ry.* v. *Sutherland*, 273 U.S. 182, 191-192. But the fact that Congress expressly preserved the powers conferred by the Trading with the Enemy Act even as to property not vested on the date of

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[2] "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however*, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest."

[3] Since the will here, pursuant to which petitioners acquired the interests which they seek to assert, was filed in 1943 (Abst. of Record, 1), those interests were subject to vesting prior to January 1, 1947.

that resolution removes any conceivable doubt that those powers remain available as to property vested prior to that date. Accordingly, the present case is totally unlike *United States ex rel. Jaegeler* v. *Carusi*, 342 U.S. 347.

The Joint Resolution, by specifically authorizing vesting of German interests existing prior to 1947, also makes it unnecessary to discuss petitioners' arguments (Brief, p. 14) that the vesting of their property in 1949 was an abuse of the discretionary authority to vest.

CONCLUSION

The decision of the court below is correct and the case presents no new or undecided constitutional questions. The writ should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
HAROLD I. BAYNTON,
Assistant Attorney General.
HERMAN SMITH,
Special Assistant to the Attorney General.
JAMES D. HILL,
GEORGE B. SEARLS,
Attorneys.

MARCH, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 993643 900

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Office - Supreme Court, U. S.
FILED
MAR 27 1952
CHARLES ELMORE CROPLEY
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IN THE

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OCTOBER TERM, 1951.

No. 606

ADELHEIDT AUGUSTA NINA EDWINA VON HARDENBERG AND IRMGARD STELLA VON ALTEN,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY TO BRIEF IN OPPOSITION.

ROLAND TOWLE,
111 W. Washington St.,
NORMAN J. BARRY,
11 So. La Salle St.,
Chicago 2, Illinois,
Counsel for Petitioners.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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